No. 12105

IN THE

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

APEX FISH COMPANY, a corporation,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT UNITED STATES OF AMERICA

J. CHARLES DENNIS,
United States Attorney.

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FRAYN PRINTING COMPANY

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1

STATEMENT OF JURISDICTION

This is an appeal from a final decree of the United States District Court for the Western District of Washington, Northern Division, in admiralty. The action was instituted by filing a libel in personam under the Suits in Admiralty Act (46 U. S. C. §742, et seq.) (Aps. 2, 24) by Apex Fish Company, a corporation, seeking recovery from the United

States of America of $19,321.89 alleged damages to a shipment of 1358 barrels of mild cured salt herring, due to alleged improper stowage of said cargo on board the SS "DENALI," which vessel was then being operated under bareboat charter to the United States of America. The decree of the court awarded damages against the United States of America as bareboat charterer of the vessel and pursuant to terms of the Suits in Admiralty Act, supra, in the sum of $18,783.92. The United States of America has appealed from this decree.

This action being cognizable in admiralty, to-wit, alleged damage to cargo being carried on board a vessel under bareboat charter to the United States of America, is governed by the Suits in Admiralty Act (46 U. S. C. §742, et seq.). Action is properly brought against the United States in the District Court (46 U. S. C. §742) (28 U. S. C. §1333). From the final decree in appellee's favor, an appeal may be taken to this court (28 U. S. C. §§1291, 1294).

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STATEMENT OF THE CASE

A. *Facts.*

This is a case of alleged *concealed cargo damage.* 1358 barrels of mild cured salt herring were loaded on board the SS "DENALI" (Voyage 55) in No. 3 and No. 4 lower holds in the usual manner and in

apparent good order and condition and were subsequently discharged in apparent good order and condition. Upon opening some of the barrels for inspection, the shipper-consignee found the contents of many of the barrels to be in various stages of decomposition and spoiled.

The SS "DENALI" is a combination cargo and passenger steamship regularly engaged in the Alaska trade. It arrived at appellee's saltry at Port Wakefield, Alaska (on Rasberry Island near Kodiak) on August 23, 1946, to load the said herring, which had been processed and packed there. At that time about 400 of the barrels were piled on the face of the dock, uncovered and exposed to the elements (Aps. 276, 308-310). The balance of the shipment was piled just inside the large open front door of the saltery and immediately adjacent to the face of the dock (Libelant's Ex. 8). The shipment consisted of 110 quarter-barrels, 119 half-barrels of large herring and 1129 half-barrels of medium herring, but as no segregation has been made and no issue is presented involving the difference in the barrels, they are dealt with herein without regard to such size or contents.

Loading was first into No. 3 lower hold, between the two shaft alleys. After 971 barrels had been loaded, several tiers high, the balance of the shipment consisting of 387 barrels was stowed in No. 4

lower hold, likewise between the two shaft alleys. The "DENALI" is a twin screw vessel and the two shaft alleys run through No. 3 and No. 4 lower holds with cargo space in between. (Aps. 288-291). No other cargo was placed in either hold during the voyage except cases of canned salmon in the wings of No. 3 lower hold, and cases of canned salmon in No. 4 lower hold, some of which were overstowed on top of the 387 barrels in that hold (Aps. 382).

Appellant issued a clean bill of lading for the shipment. Only ordinary stowage was requested and contracted for this shipment, and no contention is made that the vessel was obligated to furnish cold storage or cool room stowage. It is conceded that only ordinary stowage was required or expected (Aps. 164, 277).

The "DENALI" sailed from Port Wakefield on August 24, 1946, and proceeded to nearby Port Vita, where about 1000 barrels of salt herring were loaded into No. 1 lower hold. This shipment subsequently outturned from the vessel in good condition (Aps. 378).

Canned salmon was loaded in No. 4 lower hold at Port Bailey, August 24th and 25th, and more canned salmon was loaded into No. 3 lower hold at Shearwater Bay and Moser Bay on August 27th and 28th, respectively. There was no other loading

into holds No. 3 or No. 4 on the voyage in question (Aps. 381).

The "DENALI" had a usual summer voyage and nothing occurred on the vessel during the voyage in question which would have had any bearing upon the question of damage to cargo, and no issue is raised as to any defect or unseaworthiness of the vessel (Aps. 293). The stowage of the barrels of salt herring in No. 3 and No. 4 lower holds is usual and customary stowage, and has been done on this vessel on many occasions before and after the voyage in question, without any damage (Aps. 295, 408—Libelant's Ex. 16).

On September 4, 1946, the day after arrival at Seattle, the 971 barrels in No. 3 lower hold were discharged to the dock, beginning at about 9 o'clock P. M. (Aps. 322). When about 100 barrels had been discharged, the shipper-consignee, or its representative, started to open some of the barrels for inspection and then found that the herring in some of the barrels were in unfit condition, and concluded that the condition was attributable to heat (Aps. 324).

A general maritime strike became effective at midnight of the same evening, or on September 5, 1946, and the "DENALI" was shut down (Aps. 329). The 387 barrels of herring in No. 4 lower hold could not be discharged and remained in the vessel

until September 25, 1946, at which time these barrels were discharged and were found in the same general condition as those barrels discharged from No. 3 lower hold (Aps. 358). Generally, however, these barrels from No. 4 lower hold were in a less deteriorated condition than many of those discharged from No. 3 lower hold (Aps. 224).

This suit is to recover the damage to the barrels of herring alleged to have had a sound value of $27,876.00, less the proceeds of sale of the damaged herring amounting to $10,329.00, leaving an alleged net loss of $17,547.00, plus expenses amounting to $1,236.92. There is no issue raised on appeal as to the extent of appellee's loss if appellant is liable therefor.

B. *The Law.*

(1) In cases of concealed damage to cargo such as the contents of barrels of mild cured salt herring, no presumption of good order and condition at the time of shipment results from the bill of lading recital of apparent good order and condition, and appellee has the burden of proving actual good order and condition at time of shipment.

The Dondo, 287 F. 239 (S. D. N. Y);

Monnier v. United States, 16 F. (2d) 812 (E. D. N. Y.), Affirmed 16 F. (2d) 815 (C. C. A., 2);

George F. Pettinos, Inc. v. Thos. & Jno. Brocklebank, 65 F. Supp. 102 (E. D. N. Y.);

The Niel Maersk, 91 F. (2d) 932 (C. C. A., 2) Cert. den.. 302 U. S. 753;

Albers Bros. Milling Co. v. Hauptman, 95 F. (2d) 286 (C. C. A., 9).

(2) Where the nature of the damage to the cargo, e. g., spoilage of salt herring in barrels, is not peculiar to nor characteristic of damage which would occur as a result of negligence or unseaworthiness of the vessel, and is characteristic of the inherent vice of the cargo (subject to decay and putrescence), appellee has the burden of proving that the damage actually did occur upon the vessel and as a result of negligence or unseaworthiness. This is not a case of the carrier seeking exoneration from a loss or damage admittedly or presumptively caused by the vessel, and relying upon bill of lading or Carriage of Goods by Sea Act exceptions. Here the issue is whether the appellant carrier was in any manner responsible for the damage, in a physical sense. Otherwise stated, did the decay commence from conditions aboard the vessel at all, as distinguished from bad condition of the fish at time of shipment, or inherent vice?

The Niel Maersk, supra, distinguishing the decision in *Schnell v. The Vallescura,* 293 U. S. 296;

Albers Bros. Milling Co. v. Hauptman, supra, approving *The Niel Maersk;*

The American Tobacco Co. et al. v. S. S. Katingo Hadjupatera, et al., 1949 A. M. C. 49, 81 F. Supp. 438 (S. D. N. Y., Nov. 23, 1948).

(3) If the barrels of herring were given usual and customary stowage and nevertheless spoiled while on the vessel, such condition is the result of inherent vice of the cargo and the vessel is not liable unless the appellee sustains the burden of proving actual negligence or unseaworthiness.

The Rangoon Maru, 1926 A. M. C. 1629 (S. D. N. Y.), affirmed 27 F. (2d) 722 (C.C.A., 2);

The American Tobacco Co. et al. v. S. S. Katingo Hadjupatera, et al., supra;

Bache v. Silver Line, 110 F. (2d) 60 (C.C.A., 2).

(4) The exception of "strike" applies to the 387 barrels of herring stowed in No. 4 lower hold which could not be discharged due to the general maritime strike until September 25, 1946, a delay of 21 days after the vessel would have been dischargd but for the strike.

The Maui, 113 F. (2d) 1018 (C. C. A., 9).

C. *Questions Involved.*

(1) Did appellee sustain the burden of proving the good order and condition of the barrels of herring at time of shipment, having consideration for the voyage undertaken and that only ordinary stowage was contracted for?

(2) Did appellee sustain the burden of proving that the barrels of herring were damaged from any physical cause or peculiar condition on board the vessel?

(3) Did appellee sustain the burden of proving that the barrels of herring were damaged as a result of some negligence or unseaworthiness of the vessel, to-wit, heat in the No. 3 and No. 4 lower holds?

(4) Was the stowage afforded this cargo reasonable and proper under all of the circumstances known to both parties, to-wit, the inherent vice of the cargo?

(5) Was the damage to cargo in No. 4 lower hold (387 barrels of herring) due to unavoidable delay in discharging the vessel on account of the general maritime strike in effect between September 5, 1946, and September 25, 1946; and was there any ground whatever for finding that damage to the 387 barrels of herring in No. 4 lower hold was attributable to conditions in that hold during the voyage, rather than unavoidable delay in discharging that hold on account of the general maritime strike in effect between September 5 and September 25, 1946?

D. ***Manner in Which the Questions Are Raised.***

The foregoing questions are presented here upon appellant's exceptions taken and allowed to the findings of fact and conclusions of law entered by the lower court on August 2, 1948 (Aps. 81, 82), with judgment and decree resulting therefrom in favor of appellee in the sum of $18,783.92.

Appellant by assignment of errors presents the errors claimed, not on the basis of findings of fact upon a conflict in the evidence, but on the basis of findings of fact made by the lower court not based upon any material evidence in the case and contrary to the preponderance of the evidence, and also upon the basis of erroneous application of the law by the lower court in the matter of burden of proof, all in the following respects:

(1) The lower court found and decided that the barrels of herring were in good order and condition when put aboard the vessel. This finding was premised entirely upon the evidence of appellee as to the usual and customary method of processing and packing mild cured salt herring, and that this process was followed with respect to the barrels in question in this case. No actual inspection was made by anyone at the time of shipment or immediately before shipment, and the court's conclusion is not warranted even though appellee's evidence be accepted at face value.

Appellant's evidence tending to show probable bad condition at time of loading, such as the fact that about 400 barrels were stored on the face of the dock without cover and were dry and warm to the touch, is not convincingly controverted. The packing dates show many of the barrels to have been thirty days old when loaded and stored during

all that time in ordinary open warehouse. None of the barrels were less than two weeks old at the time of shipment.

It is appellant's contention that the court found good order and condition on no evidence, or on insufficient evidence. This is not a case of conflicting evidence where a presumption exists in favor of the findings of the Trial Court. This is a case of a finding based upon no material evidence and not supported by the uncontradicted evidence. Lastly, there is certainly no preponderance of evidence to sustain appellee's burden of proof.

(2) The lower court found that the barrels of herring were damaged by excessive heat in No. 3 and No. 4 lower holds during the voyage, for which the vessel was liable.

This finding is not based upon any evidence in the case, nor is it warranted as a conclusion from any evidence. On the other hand, appellant's evidence, which is not controverted, establishes beyond question that No. 3 and No. 4 lower holds did not contain heat; that there is no source of heat therein; that herring and other perishable cargoes are successfully carried therein. Here again there is not a case of conflicting evidence, but rather a finding based on conjecture and not warranted as a conclusion from the uncontroverted evidence in the case.

(3) The lower court erroneously held that the *appellant* was required "* * * to prove by a preponderance of the evidence that nothing occurred in the course of the voyage which did actually damage or might reasonably have been expected to damage this shipment * * *," and that appellant failed to sustain this burden of proof (Aps. 457).

There are two objections to this. First, the burden of proof does not rest upon appellant but rests upon appellee to prove that the barrels of herring were in fact damaged by a physical cause on board the vessel, i. e., that the contents of the barrels were damaged by artificial heat created by the vessel, as distinguished from mere normal atmospheric temperature and that there was in fact excessive heat in No. 3 and No. 4 lower holds. Second, the preponderance of the evidence in the case affirmatively establishes without question that there was no artificial heat at all and certainly no excessive atmospheric heat in either hold. This latter proposition is not premised upon conflicting evidence, but is the only warranted conclusion to be drawn from all of the uncontroverted evidence.

It is well to call attention at this point to the fact that this is not the usual type of cargo damage case, where goods are known to have been damaged by the ship or while on board the ship, as can be inferred from the nature of the harm, such as salt

water damage, sweat, or visible breakage. Nor does appellant seek the benefit of Section 4(2)(q) of the Carriage of Goods by Sea Act (46 U. S. C., §1304), which casts upon the carrier the burden of proving lack of negligence, or exercise of due diligence. It is appellant's position that the cargo being found to have suffered concealed damage of an inherent nature (decay and putrescence) at a time or times unknown, appellee must prove that the damage resulted from some definite and improper or negligent cause or causes connected with the ship. No presumption of cause or negligence against a ship arises from decay and putrescence of the contents of barrels of mild cured salt herring, simply because they were carried on that ship.

(4) The court's decision is premised upon facts which do not appear anywhere in the record and upon clearly erroneous conclusions drawn from facts shown, all leading to the improper conclusion of the court that " * * * the preponderance of the evidence compels the court to find and conclude that the damage to the contents of these barrels of salt cured herring resulted proximately from excessive heat in Nos. 3 and 4 lower holds because of improper stowage and lack of care of the ship's cargo space, particularly holds 3 and 4 during the voyage and before discharge of the cargo on or before the 4th day of September, 1946 * * *."

Accepting appellee's evidence in full and appellant's evidence to the extent it is not controverted, no such finding, inference or conclusion can be made on the record of this case either as a matter of law or of fact.

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ASSIGNMENTS OF ERROR RELIED UPON

A. *First Assignment Relied Upon.*

> "2. That the court erred in making and entering Finding of Fact VIII in respect of finding that the shipment as received by respondent on board the S.S. DENALI at Port Wakefield, Alaska, on or about August 23, 1946, was then in good order and condition." (Aps. 85)

Finding of Fact VIII, attacked by the foregoing assignment of error, is as follows:

> "That on August 23, 1946, libelant delivered to respondent at the port of Port Wakefield, Alaska, certain merchandise in good order and condition, to-wit, 110 quarter barrels of salt herring, 119 half barrels of large salt herring, and 1129 half barrels of medium salt herring to be carried from said port of shipment to the Port of Seattle, Washington, and there to be delivered in like good order and condition as when shipped to the order of James Farrell & Co. in consideration of an agreed freight and in accordance with the valid terms of a certain bill of lading on the WARSHIPSHORTBLADING form then and there signed and delivered to said shipper by the duly authorized agent or representative of the respondent." (Aps. 78)

The lower court apparently conceded the rule applicable to cases of concealed damage to cargo, re-

quiring the shipper to prove the actual good order and condition of the contents of the barrels at the time of shipment, and found and decided that appellee had sustained the burden of proof (Aps. 454).

Appellant contends, first, that there was no evidence of actual good condition at the time of shipment, for the intended voyage, and second, that the evidence produced by appellee was insufficient to sustain the burden of proof in any event.

(1) *The Evidence—Good Order and Condition.*

The only testimony in the case tending to have any direct bearing upon good order and condition is that of appellee's President and General Manager, Mr. Lee H. Wakefield (Aps. 101 to 140). He testified that all of the stock of appellee corporation was owned by himself and his family; that he had been in the "salt herring business" since 1916; that his duties were to "supervise, hire the men that did the work and also to sell the product"; that he had done gibbing and packing, curing and coopering himself at various times; that the plant located at Port Wakefield, about thirty miles from Kodiak, processes herring, herring meal and oil in addition to packing mild cured salt herring in barrels (Aps. 111). The plant consists of one building, with the boiler and the fish meal and oil portion of the plant at the inshore end and the saltery at the dock end

of the building. There is a small dock on the face of the plant building. No facilities exist for refrigerating or cooling any of the products (except atmospheric conditions), and after they are packed the barrels are stored in the plant itself and out on the dock when the company is getting ready to ship them to Seattle (Aps. 126).

In answer to the question—

> "Will you please state in detail how salt herring is processed by Apex at that plant, commencing with the delivery of the fish by the fishermen at the dock?" (Aps. 111)—

the witness detailed the process followed in the packing and curing of the herring generally, including the segregation of fish for quality when first received at the plant (Aps. 111 to 116). Some fish are not in proper condition for packing because they contain black feed or because they are "soft and mushy" when received. The witness stated that the method of packing was standard, and had been followed by him since 1916, and was followed in packing the 1358 barrels involved in this action (Aps. 116).

These barrels of herring were packed at various times beginning on July 24, 1946, when 225 of the barrels were packed in one day, and up to August 10, 1946, when the last 53 barrels of the shipment in question were packed (Libelant's Ex. 7). These barrels were not shipped on the DENALI until August

23, 1946, and were therefore held at the plant for from 13 days to 30 days up to the time of the shipment.

The barrels were stored during this time in the plant. The witness testified the plant was cool, as the floor was rather wet (Aps. 124). After repacking, about 400 of the barrels were stored outside on the face of the dock awaiting shipment (Aps. 126) (Libelant's Ex. 8). This piling of barrels on the dock commenced "about the last week of packing" (Aps. 128), and Wakefield contended that the barrels were covered with tarpaulins or salt sacks and kept wet (Aps. 127).

This witness also testified that these barrels would be in the shade, which does not coincide with the physical evidence of Libelant's Ex. 8, being a photograph of the face of the plant bathed in full sunshine.

The witness also testified he was present on the dock when the DENALI arrived and during the loading of the barrels of herring (Aps. 128).

On cross-examination further facts were developed as follows: These herring were a mild (or Scotch) cure, as distinguished from a heavy (or Norwegian) cure. Mild cured herring "has to be kept fairly cool" for the milder the cure the more delicate and perishable are the herring (Aps. 142). This lot of barrels of herring had a brine strength

of about 85% as cured. The original cure, which is effective in the first ten days after packing, is a more or less fixed condition which is not increased by adding heavier brine later (Aps. 144). In repacking or refilling the barrels about 10 days after the original packing, about half the brine is drawn off to let the herring settle more solidly in the barrel, and additional herring are added to fill the barrel; the top is then put on and they are ready for shipment (Aps. 145). The barrels are then stored on their sides in the warehouse and out on the dock until the vessel arrives for loading. Those stored inside are "right up against the wall inside the door" (Aps. 151). The barrels are not inspected again after repacking (Aps. 147). Shipments are not made in less than carload lots by appellee. The packing is irregular, according to available supply of fish, and the repacking is also done at irregular times (Aps. 154). The witness thought that the 225 barrels packed on July 24 and the 102 barrels packed on July 25 were repacked about August 4th or 5th. (These herring at the time of shipment were almost three weeks old, had not been inspected during that time, and had been subjected to outside atmospheric temperatures).

As to the barrels stored out on the dock, the witness, having said on direct examination that the face of the dock was cool and out of the sun, stated

on cross-examination his reason for covering these barrels with salt sacks, "that the sun might come out and be sufficiently warm to affect the herring" (Aps. 156). In answer to this question:

"The sun does affect the herring, does it?"

Wakefield answered:

> "Well, if it is hot enough it might. It would draw the oil. It will draw the oil on them if it is very hot." (Aps. 156).

(This was exactly the damage to the herring found upon their discharge from the vessel (Aps. 207)).

An interesting and very material fact is shown by the weather report submitted by appellee in answer to respondent's Interrogatory No. 17 (Aps. 67). Under the heading "Precipitation" in the right-hand column the total precipitation for August, 1946 at Kodiak is shown as –2.26 departure from normal, thus indicating only about 50% of normal rainfall for that month. It must be conceded that August, 1946, was a dry month at this locality and this may well have had a direct bearing on the condition of the barrels of herring allowed to stand in the open plant for from two to four weeks before shipment.

In testifying to what was customarily done with the barrels of herring after arrival in Seattle, the witness stated that whether they were placed in cold storage or not depended upon the weather;

that "when it is cold, rainy weather it isn't necessary to store herring in cold storage"; that if the weather suddenly gets warm it is "put in cold storage" (Aps. 163). The witness testified further that he had always shipped barrels of herring "in the ordinary hold of the ship" and not in cold storage (Aps. 164). However, shipment from Seattle east to New York is in refrigerated railroad cars (Aps. 64).

Upon the question of good order and condition at the time of shipment, testimony by the appellee's witness Kniseley, the chemist who inspected the barrels the day after discharge from the vessel, has a direct bearing.

His inspection pertained to the 971 barrels discharged from No. 3 lower hold. He testified as follows (Aps. 207):

> "Q. What was the condition of the fish that you saw?
>
> A. Well, this lot was in varied conditions—some barrels bad and some not so bad.
>
> Q. What was the condition of the ones which you have designated as bad?
>
> A. There was a layer of clear oil on top of the barrels. The barrels were actually warm to the touch and the fish were warm to the touch; when you examined the fish there was a definite odor and the flesh of the fish was soft and there was certain sloughing of scales — every indication that they had been injured by *elevated temperature.*"

After testifying that he took temperatures in the center of the worst barrel and found a temperature of 77° Fahrenheit, and that having picked out 10 or 12 of the worst barrels, he found temperatures in them ranging between 70° and 77°, but that only one barrel was as high as 77° (Aps. 227), he further testified as follows:

> "Q. (By Mr. [Claude] Wakefield) Can you tell us, Mr. Kniseley, your opinion as to the amount of temperature and the lengths of time being subjected to that temperature which would be required for a barrel of herring, properly cured, to go to pieces and become soft, such as you found in the herring in question?
>
> A. I would estimate that it would require about 5 days at 77°.
>
> * * * * *.
>
> Q. Going back to the same question which you answered (About 5 days at 77°', would that answer require any qualification depending upon the degree of cure that the herring had been given?
>
> A. Yes, I believe so." (Aps. 214)

As to the lot of 387 barrels discharged after the strike on September 25, 1946, from No. 4 lower hold, the witness testified as follows (Aps. 224):

> "Q. With respect to the barrels that you examined on September 26th, the balance of the shipment, how did they compare with those that you examined on September 5th?
>
> A. The condition was more nearly uniform. I didn't notice so many that were extremely bad. But they were all I believe worse than the best ones that I examined on September 5th.

Q. Did that same condition that you explained exist with respect to the oil and the softness of the fish?

A. Yes."

Judging from the condition of the herring in the worst barrels, it was Mr. Kniseley's opinion that the condition resulted from "elevated temperature" (Aps. 207) and that this meant any kind of atmospheric temperature, whether natural or artificial (Aps. 225).

The spoilage was not at all uniform among the 971 barrels discharged from No. 3 hold. Some were of fair merchantable quality and others were completely spoiled. The 387 barrels discharged from No. 4 hold after the strike were in more uniform condition.

In the nature of things appellant could not produce any direct evidence of bad or improper condition at the time of shipment. However, some material evidence bearing on this subject was offered by appellant as follows:

Mr. Byrnes, Chief Officer of the DENALI, testified that when the ship arrived at Port Wakefield the barrels of herring piled on the dock "were uncovered and dry" (Aps. 285), and that at that particular time (August 23, 1946) "the weather was unusually warm for Alaska. That is, it was warm weather" (Aps. 286). Mr. Teichroew, the Purser on the DENALI, testified that it was his job to

check the cargo, count the barrels, etc.; that there were about 400 barrels stored out on the face of the dock; and that these 400 barrels were in the sunshine, were uncovered, and dry and warm to the touch (Aps. 309). He also testified that customarily barrels of herring stored outside are covered and kept wet; that they are usually on end and have water standing in the tops of the barrels (Aps. 310); and that all of the barrels loaded at Port Wakefield were piled on their sides, several tiers high, including those inside the large open door in the front of the herring plant. The barrels inside were not as dry as those outside, but they did not have any water on them (Aps. 311).

Mr. Wakefield, who was present on the dock at Port Wakefield when the DENALI arrived and all during the loading of the barrels of herring, did not rebut any of this testimony, although he was present throughout the trial. The evidence of the dry and warm condition of the "about 400 barrels" of herring out on the dock and in the sun when the DENALI arrived, is not controverted.

In answer to appellee's attempt to show good order and condition by merely producing evidence that these barrels were packed in the usual and customary manner, the following points established by the evidence indicate the weakness of that proof, if it be proof at all:

(a) All of the barrels of herring were 13 to 30 days old at the time of shipment and had been stored in the open plant without refrigeration or cooling.

(b) About 400 barrels were out on the open dock in warm weather for at least 5 days, and were warm and dry when the DENALI arrived. The radiant heat of the sun will quickly damage mild cured herring.

(c) Temperature affects the herring. The barrels must be kept cool.

(d) August 1946 at Kodiak was warm and dry, there being only 50% of normal rainfall.

(e) These herring were mild-cured, in only 85% brine solution. The milder the cure the more perishable the product.

(f) The damage was not uniform, there being about 400 barrels in No. 3 lower hold discharged on September 4 which were very bad and worthless, coinciding roughly with the "about 400 barrels" piled on the dock and warm and dry when the DENALI arrived at Port Wakefield, and loaded into No. 3 lower hold.

(g) The 387 barrels discharged from No. 4 lower hold three weeks later than those in No. 3 lower hold, because of the strike, were not as bad as the worst barrels in No. 3 lower hold, but were not as good as the best discharged from No. 3 lower hold.

The lower court in its opinion gave full weight to the testimony of the witness Wakefield as to the usual and customary method of packing barrels of mild cured salt herring, and that such method was followed as to the 1358 barrels in question, and concluded, "that there was no testimony to contradict that testimony that the salt herring contained in these barrels and the subject of this litigation was the same kind of merchantable salt herring which this libelant had produced at the same saltery and shipped in other shipments at other times." (Aps. 453)

Based entirely upon the foregoing, the lower court concluded:

> "Therefore, it seems to me that the court must accept as true the testimony adduced by witness Wakefield as proof of the fact that this herring was when it was received on board the ship at Port Wakefield, Alaska, as a matter of fact in apparent good order and condition." (Aps. 453)

(2) ***The Law — "Good Order and Condition" — Concealed Damage.***

Damage to the contents of sealed barrels of herring is concealed damage, and the bill of lading recital of receipt by the ship in "apparent good order and condition" does not relieve the shipper of the burden of proving actual good order and con-

dition. Furthermore, this burden of proof cannot rest upon mere inference or speculation.

Among many cases of like sort, the decision of this court in *Albers Bros. Milling Co. v. Hauptman,* 95 F. (2d) 286 (C. A., 9) is in point. That case involved a shipment of corn in bulk, which appeared sound but was found to be defective in that "the corn's interior content of moisture, acidity and rancidity made it not in good order and condition for the voyage in question." In commenting with approval upon the opinion of Judge August Hand in *The Niel Maersk,* 91 F. (2d) 932 (C. A., 2), Judge Denman stated:

> " * * *. That decision holds that the principles of *Clark v. Barnwell,* supra, must be applied to the claims of the shipper of the fish meal and that he is required to show that the fish meal itself was in good order and condition for the contemplated voyage, and that the shipper did not escape from or discharge that obligation because the vessel's bills of lading stated apparent good order and condition."

To the same effect are the following cases:

Vernard v. Hudson, 28 Fed. Cas. 1162, Case No. 16,921 (C. C. D. Mass., Story, J.);

The Dondo, 287 F. 239 (S. D. N. Y.);

Pan-American Hide Co. v. Nippon Yusen Kaisha, 13 F. (2d) 871 (S. D. N. Y.);

Monnier v. United States, 16 F. (2d) 812 (E. D. N. Y.);

Bronstein Bros. v. Societa Anonima, etc., 25 F. (2d) 122 (E. D. N. Y.);

The American Tobacco Co. v. S. S. Katingo Hadjipatera, 1949 A. M. C. 49, 81 F. Supp. 438 (S. D. N. Y., Nov. 23, 1948).

The *Albers Bros. Milling Co.* case, above quoted from, has been followed and cited with approval in the following cases:

The Chester Valley, 110 F. (2d) 594 (C. C. A., 5);

Thomas Roberts & Co. v. Calmar S. S. Corp., 59 F. Supp. 203 (E. D. Penn.);

The Ciano, 69 F. Supp. 35 (E. D. Penn.);

The Ensley City, 71 F. Supp. 444 (D. C. Md.).

(3) *Appellee's Burden of Proof.*

Testimony of the proper, usual and customary method of processing, and that it was carried out with respect to the cargo in question, is not sufficient to sustain the burden of proof of good order and condition at time of shipping. This is particularly true where the cargo is perishable and other circumstances are shown, such as, in this case, that there was no inspection at or reasonably near the time of loading; that the processed herring were 13 to 30 days old when shipped; that about 400 barrels were and had been for some days stored on the open dock and were dry and warm when loaded; and that the extent of decay and putrescence varied in wide degree when the fish were examined after discharge.

In *Bronstein Bros. & Co. v. Societa Anonima, etc.*, 25 F. (2d) 122 (E. D. N. Y.), the shipment was of cases of straw hats packed in good order and condition at the factory at Signa, Italy. The court said:

> "The proof that the hats were packed in good condition at Signa does not prove that they were in the same condition when delivered to the ship; no witness having been called to show that the damage did not occur while in the possession of the land carrier."

In *Pan-American Hide Co. v. Nippon Yusen Kaisha,* 13 F. (2d) 871 (S. D. N. Y.), Judge Learned Hand dealt with a claim for damage to salt hides, due to decay. He considered many collateral facts bearing upon the question of good order and condition at the time of shipment, indicating the possibilities of damage prior to shipment, and illustrating why the shipper had not sustained the burden of proof. The court's view of this burden, and the evidence necessary to carry it, is well illustrated in the following excerpt:

> "On the other hand, it is easy enough to see how the hides might have in fact been damaged before delivery. Take the transit from the slaughterhouses to Rio, a matter of some eight days; DeBrito's estimate is better than Schwab's. This was in part in uncovered cars under an equatorial sun. On delivery at Rio to the warehouses, DeBrito did not examine the hides; Schwab did, but at most not over one-seventh of the whole consignment. It seems to me not impossible that decay might have already set in. Again, in the Belgian warehouse the hides were not turned, as apparently they

should have been. We can tell nothing certain of the pickling there. On the whole, it seems to me as possible, to put it as strongly for the libelant as I can, that the decay took place before the goods were delivered as afterwards. In short, the libelant has not carried its burden, and this would be enough to decide the case."

The California, 4 Fed. Cas. 1058, Case No. 2,314 (D. C. Ore.), involved shipment of five cases of merchandise, and claim that one case was short several items of its contents upon delivery at destination. The claimants offered testimony as to the original packing of the case; that it contained all of the items; that it was taken by truck from the store to the dock and delivered to the vessel. However, the court observed:

"Admitting that the goods were in the case when it left Levi's—which is not beyond doubt —and that they were taken out and the case nailed up again between that place and the wharf, at Portland, there is just as much reason to believe that the embezzlement or robbery took place while the case was on the truck, and before it was delivered to the ship, as afterwards.

"To say the least the evidence leaves it in doubt whether the goods were delivered to the ship or not. The burden of proof as to the delivery being upon the libellants, they cannot recover unless this fact is established with reasonable certainty. * * *."

Vernard v. Hudson, 28 Fed. Cas. 1162, Case No. 16,921 (C. C. Mass., Story, J.), involved damage to thirty hogsheads of bacon shipped on board the

schooner ROLLA from New Orleans to Boston. Issue arose as to whether damage resulted to these hogsheads while on board the vessel, and this in turn involved the question of proof of good order and condition when shipped. The court said:

> " * * *. How can the master be presumed to agree, that the goods are shipped in good order and condition, when he is utterly ignorant what they are, and what is their nature, and what is the state, in which they are? It is true, that the bill of lading states that the contents are bacon; but the master does not admit the fact to be so. He says he knows not the contents of the hogsheads, and therefore he can speak only to the external character of the hogsheads, which might be properly fit for one description of goods, and not for another. The evidence shows that these were western hams, which came from Cincinnati to New Orleans. When they came, how long they had been at New Orleans, and what was their condition, when shipped at New Orleans for Boston, are facts not proved by any clear and determinate evidence. That they were in very good order when shipped at Cincinnati is proved; but it is quite consistent with this fact, that, before they were put on board of the Rolla, they may have suffered all the deterioration and leakage, which were found to exist at Boston. Indeed, the evidence of the persons in Boston, who received them for smoking at Boston, is that they were in as good condition as the average of other shipments of western hams coming to Boston by the way of New Orleans. What I put the case upon in respect to damage is, that the evidence goes no further than this, that there might have been a probable damage from the goods being brought on deck, not that in this case there positively was such a damage. Now,

> under all the circumstances, my mind is left in great doubt on the point; and such a doubt alone is sufficient, under such circumstances, to repel the claim."

In our present case the barrels of herring were not inspected at time of shipment, nor at any other proximate time. The 225 barrels of herring packed on July 24, 1946, and the 102 barrels packed on July 25, were repacked about August 4th or 5th, 1946, and were not again looked at. Other barrels packed at later dates were repacked at a later time and closer to the shipment. However, the last 53 barrels in this shipment were packed on August 10, 1946 (Aps. 118). It is admitted that the processing of the herring was a mild cure and they were perishable, and it was necessary to keep the barrels cool. If, as the appellee's witness Kniseley testified, the worst damaged barrel showing a temperature of 77° would spoil to the extent found on inspection within five days at that temperature, and if the 10 or 12 worst barrels examined by him ranged in temperature from 70° to 77° with only one barrel as high as 77°, it may reasonably be questioned whether the elevated temperature did not in fact exist when the barrels were put aboard the vessel, or in any event, whether the condition of "warming up" had not progressed sufficiently at that time so that proper ordinary stowage merely permitted a progressive condition to culminate during the

twelve days the barrels were on board the vessel.

This conclusion is strengthened by the fact that the 971 barrels in No. 3 lower hold outturned in greatly varying conditions. Captain Perry, appellee's surveyor, testified (Aps. 249, et seq.) that of the total of 1358 barrels, 632 barrels were unfit for human consumption. Of this total of 632 barrels, 354 barrels came from No. 3 lower hold and 278 barrels came from No. 4 lower hold, after the strike. The balance of the shipment, consisting of 726 barrels, was in fair condition and the barrels were sold. Of this 726 barrels sold, 596 barrels were sold for 75% of full market price and the balance of 130 barrels at about ⅓ of full market price (Aps. 139).

It is a very material fact that 354 barrels from No. 3 lower hold were unfit, as this figure corresponds closely with the "about 400 barrels" stored on the face of the dock when the DENALI arrived at Port Wakefield, which were warm and dry and were first loaded into the ship in No. 3 lower hold. On the other hand, there was a considerably higher percentage of barrels spoiled in No. 4 lower hold (278 out of a total of 387) and these were aboard the ship for an additional 21 days due to the strike. From No. 3 lower hold there were 617 barrels in good condition sufficient to be sold and of this total about 500 barrels brought 75% of the full market value (Aps. 137). Of the 109 barrels sold

from No. 4 lower hold, 100 barrels were good enough to sell for 75% of full market value (Aps. 139).

If as appellee contends and the lower court found, all of the barrels of herring were in good, sound condition when delivered to the vessel and were subjected to a temperature of 80° in No. 3 and No. 4 lower holds during the voyage, the damage on outturn would most certainly have been uniform or in any event a great deal more uniform than proved to be the case upon inspection at destination.

There is, therefore, a definite correlation between outturn condition and the age and condition of the barrels at the time of loading to the ship which is more eloquent in explanation of the cause of damage than the speculation of the trial court premised only upon the testimony of customary processing.

The recent case of *American Tobacco Co. et al. v. S. S. Katingo Hadjipatera,* 1949 A. M. C. 49, 81 F. Supp. 438 (S. D. N. Y., Nov. 23, 1948) involved damage to bales of tobacco and testimony of the libelant as to inspection and proper preparation of the tobacco for shipment. The court did not give weight to such testimony as it did not necessarily apply to proper preparation of the tobacco for the voyage in contemplation, and there was no proof of the moisture content of the shipment. The court said:

" * * *. Here there is voluminous testimony

by tobacco men on the scene as to inspection and proper preparation of most of the tobacco shipped including the Cavalla belonging to Brown and Williamson and the Volos lots. It appears that Greek tobacco prepared for shipment is handled similarly by all shippers to the United States, and that the tobacco here involved was handled in the customary manner. There was no proof offered, however, of the moisture content of any shipment, and the moisture content of tobacco plays a significant role in the self-heating or fermentation of baled tobacco. In this respect the hazards of shipment resemble those of sardine meal, the spoilage of which has often been the subject of limitation [litigation]. Compare *The Niel Maersk* (S. D. N. Y.), 1936 A. M. C. 1434, 18 F. Supp. 824, reversed (2CCA), 1937 A. M. C. 975, 91 F. (2d) 932, cert. den. (1937), 302 U. S. 753, 1937 A. M. C. 1646, with *The Nichiyo Maru,* (D. Md.), 1936 A. M. C. 639, 14 F. Supp. 727, affirmed (4CCA), 1937 A. M. C. 642, 89 F. (2d) 539; *The Willfaro* (N. D. Cal.), 1925 A. M. C. 998, 9 F. (2d) 940."

We submit that appellee's evidence of customary preparation in any event raises no more than an inference of good condition, and that an inference does not rise to the dignity of proof unless it explains *the known facts* better than any other inference to be drawn from the evidence.

It may quite as readily be inferred from the evidence that the fish were not all in good condition when taken aboard the vessel. The evidence of prior like shipments in the same holds and of the successful carriage of other perishables, and that they

were considered proper holds for the carriage of perishable goods, including herring, between Seattle and Alaskan ports, and that the holds were cool on the occasions they were entered during the voyage in question (Libelant's Ex. 16), affords a proper basis for inferring that the fish in No. 3 hold, being spoiled in varying degrees upon outturn, were in varying degrees of bad order when shipped.

In *New York Life Ins. Co. v. McNeely,* 79 P. (2d) 948 (Ariz.), quoted with approval by Dean Wigmore (1 Evidence (3d ed.), 438), the principle is stated with regard to civil cases:

> "(I)t is sufficient, if the ultimate fact is to be determined by an inference from facts which are established by direct evidence, that it be more probable than any other inference which could be drawn from the facts thus proven." (p. 954).

B. ***Second Assignment of Error Relied Upon.***

> "3. That the Court erred in making and entering Finding of Fact IX in respect of the following findings:
>
> (a) That shipment was not delivered by respondent to libelant in like good order and condition as when received by respondent;
>
> (b) That shipment was damaged, destroyed or deteriorated by reason of exposure to excessive heat in lower holds No. 3 and No. 4 during the voyage in question and before discharge from the vessel;
>
> (c) That shipment was exposed to excessive

heat or any undue heat while on board respondent's Steamship DENALI;

(d) That respondent was negligent in any respect concerning the loading, stowage, care, custody or discharge of the shipment in question;

(e) That shipment was damaged at all while being carried on board respondent's Steamship DENALI;

(f) That there were no conditions nor circumstances shown by the evidence excusing nor relieving respondent from liability to libelant." (Aps. 86)

Finding of Fact IX attacked by the foregoing assignment of error, is as follows:

"That thereafter Respondent loaded all the aforesaid merchandise aboard the steamship 'DENALI' and the vessel having on board said merchandise sailed from the port of shipment and subsequently arrived at the port of Seattle, Washington, on September 4, 1946, still having the said merchandise aboard, but not in like good order and condition as when delivered to Respondent, but damaged, destroyed and a portion thereof rendered wholly valueless; that the sole, direct and proximate cause of such damage and deterioration of said cargo was Respondent's exposure of the same to excessive heat in Lower holds 3 and 4, while in the custody of Respondent during the voyage and/or before discharge; that in so exposing the said cargo and shipment of libelant to heat, respondent was guilty of negligence in the loading, handling, stowage, carriage, keeping, custody, care and discharge thereof; that there was no excuse for such negligence, nor were there any conditions nor circumstances excusing nor re-

lieving respondent from liability for the damage caused by such negligence." (Aps. 78)

The gravamen of appellant's contention has to do with the court's finding that there was excessive heat in No. 3 and No. 4 lower holds during the voyage in question. The evidence does not support such a finding on the basis of all the uncontroverted evidence in the case, nor is such a finding justified as an inference from any evidence in the case.

It is also appellant's contention that there is no evidence in the case establishing that the barrels of herring were damaged at all while in appellant's custody, and that on this issue appellee had the burden of proof, which it did not sustain.

However, as it is appellee's sole contention in this case that damage resulted from excessive heat in No. 3 and No. 4 lower holds and the lower court found such excessive heat, and that it was the " * * * sole, direct and proximate cause of such damage * * * " (Aps. 78), it is not necessary to deal with any issue except that of excessive heat.

(1) *No Evidence of "Excessive Heat"*

The only evidence in the case even remotely bearing upon excessive heat in No. 3 lower hold (which does not apply to No. 4 lower hold) is the testimony of appellee's witness Kniseley that on the day after the discharge of the 971 barrels of herring from

No. 3 lower hold, he and Captain Perry went into that hold and obtained a temperature reading on his thermometer of 80° Fahrenheit (Aps. 208). The witness Perry stated that the thermometer read 79° Fahrenheit. This was done at some time after three o'clock on the afternoon of September 5, 1946 (Aps. 253). The barrels had been discharged from this hold beginning about 9:00 o'clock in the evening of September 4 and ending about 1:00 o'clock the following morning (Aps. 324). In this connection the lower court found that the barrels had been discharged fifteen hours prior to the time this temperature reading was obtained (Aps. 455).

However, these appellee's witnsses (Kniseley and Perry) admit that at the time the temperature was taken the DENALI was and had been shut down by the strike early on the morning of September 5 and that the hatch covers were on and covered with tarpaulins (Aps. 212, 267).

The cause of the temperature in No. 3 lower hold of 79 or 80 degrees Fahrenheit on the late afternoon of September 5, 1946, was the complete shutting down of the vessel when the entire crew left because of the strike, which became effective at 8:00 A. M., September 5, 1946. Mr. Felton, the Port Engineer for Alaska Steamship Company, General Agent for appellant, testified that he was present on the morning of September 5 on board the

DENALI and that the ship was completely shut down by 10:30 A. M. (Aps. 331). He testified that in shutting down the ship the condenser, stop valves on the boilers, sea valves and overboard valves are all shut off and closed; that the light plant is shut off, and that this closes down "all forced ventilation, the blowers, fans and all forced draft equipment in the engine room"; that on-deck gear and booms are secured and hatch covers put on, and finally " * * * the last duties of the engine room on deck is to close the water-tight doors or the doors and ports that would let any air or water into the ship—to protect it. That was done on the DENALI before the crew left." (Aps. 329-330).

The effect of shutting down the vessel as described by this witness is to cause the holds and the entire ship to heat up considerably until it has had time to cool off naturally without the aid of ventilation, fans, blowers, etc. Mr. Felton testified (Aps. 333):

> "Q. (By Mr. Wakefield) We will get to that next. I just want you now to explain what effect the shutting down has on the heat within the ship and then the reasons why?
>
> A. It warms up the whole ship considerably, especially in the engine room, shaft alleys and so forth due to all the ventilating fans, blowers, forced draft blowers for the boilers being shut down. The heat is still there and there is nothing to carry it away due to the fact that the ship is all secured. All of the equipment down there

still has the heat in it and it takes hours for it to cool down. It has nothing to carry the heat out of the engine room, the fire rooms, shaft alleys and so forth.

* * * * *.

Q. Did you have occasion, Mr. Felton, to actually go down on board the DENALI on the afternoon of September 5th?

A. I did.

Q. About what time were you down there?

A. Between 3:00 and 4:00 o'clock in the afternoon.

Q. Did you go down into Number 3 hold at that time?

A. Yes.

Q. Will you tell us what the condition of Number 3 hold was at that time with respect to being warm?

A. The air was close, and seemed unusually warm.

THE COURT: On what date was that?

THE WITNESS: The afternoon of the 5th.

THE COURT: About 3:00 o'clock, did you say?

THE WITNESS: Between 3:00 and 4:00 o'clock. I don't exactly remember the time." (Aps. 333-334).

This evidence was not controverted by appellee nor is there reason to doubt its credibility. It would seem obvious that such shutting down or closing up of a steamship would result in greatly increased heat for such period of time as was required to cool

the engine room, etc., naturally and without the aid of ventilation fans, etc. The source of heat is, of course, from the boilers, condensers, steam lines, etc. Anyone who has been in the engine room and boiler room of a ship, even with full ventilation, knows that it is hot and that it would remain hot for a time after being closed up and that such heat would be transmitted to other parts of the vessel when ventilation and forced draft equipment was shut down, as it was on this occasion.

Certainly no finding of excessive heat in No. 3 lower hold during the voyage can be based upon the fact that the temperature in this hold was found to be 79 or 80 degrees some fifteen hours after discharge of the barrels of herring and five to six hours after the vessel had been shut down tight due to the strike. No temperature was taken at all in No. 4 lower hold and the finding of excessive heat in this hold is not based upon any evidence whatever.

We next consider the question of *the possibility* of any excessive heat during the voyage, as suggested by the evidence.

There is no evidence in the record of actual temperatures taken in the holds during the voyage or at the time of discharge of the barrels of herring, but there is direct evidence that there was no excessive heat in these holds and also that there was

no source from which such heat could be transmitted to these holds when the vessel was operating.

As the evidence is extensive on this issue and is not controverted by appellee's evidence, we will summarize it, as follows:

No. 3 lower hold is aft of the engine room, but the forward bulkhead is not the engine room bulkhead, as there is a companionway between No. 3 lower hold and the engine room, which connects the two shaft alleys (Resp. Ex. A-4, Aps. 291, 397). No. 4 lower hold is aft of No. 3 lower hold and runs to the stern of the vessel. The DENALI being a twin screw vessel, there are two propeller shafts, each of which is enclosed in a shaft alley, and the two shaft alleys run through the No. 3 and No. 4 lower holds with ordinary cargo space in between. The shaft alley consists of a steel housing which covers the propeller shaft and extends up from the floor of the hold about 7 feet (Aps. 363). The space is ample inside the shaft alley for a man to walk in inspecting the propeller shafts and bearings. This steel housing is made of $\frac{5}{8}$ inch steel (Aps. 338). At the end of each shaft alley there is an escape tunnel and hatch leading to the top deck, which is left open (Aps. 415). There are no steam pipes or other possible sources of heat in either No. 3 or No. 4 lower holds (Aps. 292, 327, 397, 415). There is a steam pipe in each shaft alley and a return con-

densation line, and these are insulated (Aps. 413). These steam lines are located near the top of the shaft alley housing inside and "just underneath the round of the shaft alley" (Aps. 414). There is no heat generated within the shaft alley itself from the turning of the propeller shafts. The bearings are cool (Aps. 339). The No. 3 and No. 4 lower holds are below the water line and the sea water, being 40 to 45 degrees, would cool th steel hull and have the effect of cooling the holds (Aps. 335). There were no conditions in either hold which could produce any artificial heat beyond normal atmospheric temperature (Aps. 396-397). There was no cargo in either hold, other than the barrels of herring, which could produce heat—only cases of canned salmon (Resp. Ex. A-2; Aps. 363, 382). Nothing occurred on the voyage on board the vessel which could account for any heat in these holds (Aps. 340, 373). Any heat in the shaft alleys is carried away by the open escape hatch at the after end (Aps. 415).

Mr. Burns, Chief Officer of the DENALI, testified that No. 3 and No. 4 lower holds were dry and clean and in proper condition when the barrels of herring were loaded (Aps. 293); that these holds are not warm holds (Aps. 295); that nothing occurred on the voyage to account for possible heat; that barrels of herring and other semi-perishables

are customarily carried in these holds (Aps. 369, 397) (Libelant's Ex. 16). Mr. Burns was in No. 3 and No. 4 lower holds several times within four days after the loading at Port Wakefield and was climbing up on and over the shaft alleys in connection with the loading of cases of canned salmon. He testified everything was normal and that as to the shaft alleys "it was neither ice cold nor warm" (Aps. 385). There was no cargo stowed on top of the barrels of herring in No. 3 hold (Aps. 382).

Mr. Teichroew, the Purser, testified he was in No. 3 and No. 4 lower holds on the voyage from Port Wakefield to Seattle and that they were "normally cool" (Aps. 313).

Mr. Sharp, the checker who handled the discharge of the 971 barrels of herring from No. 3 lower hold, commencing about 9:00 P. M., September 4, 1946, testified as follows (Aps. 324):

> "Q. (By Mr. Wakefield) Did you feel any of the barrels with your hands or otherwise?
>
> A. I did, when I looked at them. The fish was cooked the way they expressed themselves. That is, the men that refused to buy them on account of the condition they were in—a buyer from Canada as I remember it made the remark that the fish was cooked, that all it was fit for was fertilizer. I wondered how they got cooked and I figured if they were the barrels would have to be hot. I felt some of them.
>
> Q. Were the barrels hot or warm?
>
> A. They weren't cold. They would be just

what you would call the chill taken off of them. If I put my hands in water, of the same temperature I would say it was tepid, that was all. It was certainly not warm enough for cooking to suit my taste."

Mr. Hanson, Superintendent of Alaska Terminal & Stevedoring Company, and prior to that time Chief Stevedore for Alaska Steamship Company since 1936, whose job is to get cargo into and out of the vessels and to determine where to put cargo (Aps. 344), testified:

1. Neither No. 3 or No. 4 lower holds are warm holds, and they are proper places to stow barrels of salt herring (Aps. 346).

2. These lower holds are proper places to stow semi-perishable cargo such as citrus fruits, eggs, lard, onions, tomatoes, potatoes, candy, etc. (Aps. 349).

3. There was no cargo stowed in either No. 3 or No. 4 holds on the voyage in question which would produce any heat (Aps. 351).

Mr. Damalin, Longshoreman Foreman, with experience since 1910, and familiar with Alaska Steamship Company vessels, including the DENALI, for the past fifteen years, testified he was familiar with No. 3 and No. 4 lower holds on the DENALI, and in fact, acted as foreman in discharging the barrels of herring in question in this case from No. 4 lower hold on September 25, 1946

(Aps. 357); that he had always found No. 3 and No. 4 lower holds to be cool (Aps. 359); that he was actually down in the holds, standing on and climbing over the shaft alleys, and "I have never found them warm yet" (Aps. 362); and that he has done this many times as soon as the vessel arrives and the discharging commences (Aps. 364).

While objection was sustained by the court to admission of appellant's evidence of the carriage of barrels of salt herring and of other semi-perishable cargoes in No. 3 and No. 4 lower holds without damage or loss on many other voyages of the vessel (Aps. 295 to 306), appellee nevertheless offered and the court received in evidence the survey report of James Gow made on behalf of appellant at the time of the loss, as Libelant's Ex. 16 (Aps. 408), and cross-examined the witness at great length concerning other shipments of herring and other cargoes successfully carried in No. 3 and No. 4 lower holds, and appellee must, therefore, be held to have waived the objection. The said survey report (Libelant's Ex. 16) was offered and received in full and the above-mentioned evidence is therefore before the court. Libelant's Exhibit 16, being a competent survey report made at the time of the loss and before claim or suit, and offered in evidence by appellee, is entitled to great weight. Mr.

James Gow is well qualified in such matters (Aps. 385 to 388).

(2) *Lower Court Erred in Finding "Excessive Heat"*

In the lower court's decision it was stated (Aps. 455):

> "There was some oral testimony to the effect that while the unloading of the herring was in progress some heat about the shaft alleys was noticeable, although there was some oral testimony to the contrary."

Appellant contends that this statement is wrong. A review of the evidence fails to disclose any such testimony. Appellee is invited to point out to this court any such evidence in the case.

Upon all of the foregoing evidence the lower court nevertheless found: "that at and before time of discharge such temperature in the hold was excessive * * *." (Aps. 455). This is a finding of a material fact upon which appellee had the burden of proof, and such burden was not sustained, nor is there any evidence from which a legal inference of such fact arises. The finding is based upon mere speculation and conjecture, or what the Trial Judge may have thought about it, unaided by evidence or reasonable inference from evidence and against the great weight of the only credible evidence on the point.

Nowhere in the testimony of appellee, the court's

opinion or the findings of fact does it appear what is meant or found by "excessive heat" nor what is "excessive heat" as applied to a barrel of mild cured salt herring. The court's finding of "excessive heat" may mean that 40 degrees, 50 degrees, or even 60 or 70 degrees was excessive, or it may mean that because the temperature in No. 3 lower hold was 79 or 80 degrees, some 5 to 6 hours after the vessel had been shut down tight by the strike, that this was the temperature in the hold during the voyage and that such was excessive.

Mr. Kniseley, appellee's expert witness, stated that a barrel of mild cured salt herring subjected to a temperature of 65 to 70 degrees would not spoil, to the extent found in the herring in question after discharge, for a period of 30 to 45 days (Aps. 222). This shipment as to No. 3 lower hold was in the vessel only 12 days—August 24 to September 4. On this basis we would have to conclude that if the temperature in the hold was as high as 70 degrees, this would not be excessive and therefore the Trial Judge must have in some manner found that the temperature in No. 3 and No. 4 lower holds was above 70 degrees during the entire voyage and that such hypothetical temperature was excessive for ordinary stowage on a voyage in the summertime, and also that appellant was negligent in accepting the shipment for stowage in No. 3 and No. 4 lower

holds because it knew that the temperature would be above 70 degrees and also knew that such temperature would cause the herring to spoil.

On the other hand, appellee, in answer to Interrogatory 16 propounded by appellant, stated that a temperature of 70° for one week would spoil the herring. This interrogatory and answer thereto was offered and admittted in evidence and is as follows (Aps. 278):

> "Question: If salt herring in barrels has been damaged and rendered unfit for food as a result of heat encountered on the trip from Port Wakefield to Seattle by vessel, state your opinion as to what degree of heat and for how long a time it would be required to do such damage?
>
> "Answer: Libelant believes that the subjection of salt herring in barrels to heat up to 70 degrees for one week would damage it and render it unfit for food."

If the shipment as tendered to the vessel for a 12-day voyage in the summer months and for ordinary stowage would spoil in seven days of temperature of only 70° Fahrenheit, it was not in proper condition for such a voyage, within the knowledge of the shipper.

All of this finding about "excessive" temperature in both lower holds is certainly speculation and not in any way supported by the evidence. If it had appeared that something had gone wrong, such as the breaking of a steam line or the failure of equipment or the presence of other hot cargo, etc., any

one of which could have produced greater heat than is normal in these holds and such heat as would be excessive heat for the carriage of barrels of mild cured salt herring even in ordinary stowage, appellant would be put to it to prove absence of negligence or that such heat was not excessive; but there is no such situation presented here. All we have in the record of this case is a situation of ordinary stowage in a hold frequently and customarily used for stowage of barrels of herring and other semi-perishable cargo carried on a normal and usual voyage of the DENALI, unattended by any factors accounting for abnormal heat or other improper conditions in the holds, and the outturn of the barrels of herring at destination damaged due to "elevated temperature," which elevated temperature may have resulted from any number of sources, including the inherent vice of the cargo itself.

(3) *Inherent Vice — Burden of Proof of Damage Aboard Ship.*

The issue of "inherent vice" is raised in appellant's answer, and was at all times before the court (Aps. 10).

In the *Dondo,* 287 Fed. 239 (S. D. N. Y., Learned Hand), damage was due to the contents of bales of lambskins outturned wet. In addition to announcing the rule of concealed damage and holding that

the shipper has the burden of proof of showing good order and condition when shipped, the court also said:

> "The shipper must show damage while in the carrier's hands and it is only an excuse e. g. an exception in the bill of lading that the carrier must allege and prove."

In *Pan-American Hide Co. v. Nippon Yusen Kaisha,* 13 F. (2d) 871 (S. D. N. Y.), Judge Hand considered another case similar to the foregoing, involving damage to salt hides by water. This was not a case of concealed damage, and delivery in good order was established prima facie by the bill of lading recital. Delivery in damaged condition was shown. However, the court said:

> "I agree that the recital in the bill of lading and the delivery in bad order make out a prima facie case for the libelant. However, a prima facie case is one thing, and the burden of proof is another. *The libelant has that burden on the issue whether the goods were damaged while in the carrier's custody.* Taking all the evidence in the case, I am not convinced that it did." (Italics ours)

A further statement in the opinion is material in our present case. The damage to the hides was spoilage or decay. The court said:

> "Decay resulting merely from the condition of the goods unaffected by any contributing factor arising on shipboard is not chargeable against the ship even without exception. The brig Collemberg, 1 Black, 170, 17 L. Ed. 89; The Freedom, L. R. 3 P. C. 594, 600 (semble)."

Improper stowage was considered and found in the cases of the *Niel Maersk,* 91 F. (2d) 932 (C. C. A., 2), and *Albers Bros. Milling Co. v. Hauptman,* 95 F. (2d) 286 (C. C. A., 9), in conjunction with a finding of failure of the shipper to bear the burden of proof of good order and condition at time of shipment, and the carrier was nevertheless not held liable.

In the *Niel Maersk* (supra), the damage was to fish meal in sacks due to excess moisture and improper "stowage in ill-ventilated and hot portions of the ship." Nevertheless, even with proof and a finding of such a sufficient cause to account for the damage, the court refused to allow any recovery because of lack of proof of the condition of the shipment when delivered to the carrier.

> "Without proof of such condition there would be no basis for calculating any damages caused by the carrier. The condition of the goods when placed on board was not within its knowledge and it should not have the burden of separating damages arising from causes prior to shipment from damages due to negligent stowage."

In the *Albers Bros. Milling Co.* case (supra) the lower court had found that the stowage of corn might have resulted in some damage to it, or that there might have been "heightened damage from defect in stowage." Nevertheless, on the basis of failure of proof of good condition at time of shipment, the shipper did not prevail in this court.

> "It being affirmatively shown that the corn was not in good order and condition for the voyage, and that it presented the likelihood of damage if stowed in the customary method for the trade, the burden of segregating this damage from any heightened damage from defect in stowage would fall upon the shipper. The carrier cannot be called upon to segregate the damage caused by the act of the shipper in giving to the carrier a commodity which had the internal and nonapparent vice proved to exist in this corn."

This doctrine is now well established, and was recently applied in a case similar to the present one. *American Tobacco Co. et al. v. S. S. Katingo Hadjipatera,* et al., 81 F. Supp. 438 (S. D. N. Y., Nov. 23, 1948). In this case the cargo was bales of tobacco stowed in No. 3 lower hold and 'tween deck. The damage was from heat and resulting fire from spontaneous combustion. The libelant contended and the court found that the stowage was improper. The two lots of tobacco which heated and were damaged were described as the "Volos" and "Cavalla" tobaccos.

The court said:

> " * * *. Other than Volos and Cavalla, no tobaccos self-heated, no matter where stowed. It must be inferred that the Cavalla and Volos lots were, at the very least, more susceptible to heating than all the other tobacco. Since it has already been found that the over-stowage of No. 3 tweendeck materially reduced the ventilation of No. 3 hold, the conclusion is warranted that a combination of improper stowage

and susceptibility to heating of the Cavalla tobacco caused the fire in No. 3 hold."

Due to the nature of the cargo and its susceptibility to internal defects, the defense of "inherent vice" was raised and considered by the court. It was held that in such cases the burden of disproving that the damage resulted from interent defects rested with the shipper. In reviewing the law leading to this conclusion the court said:

> "The Supreme Court has said that the carrier by sea who delivers in bad condition cargo that he had received in good condition has the burden of establishing every exception to his general liability; *Schnell v. The Vallescura,* 293 U. S. 296, 1934 A. M. C. 1573. The weight of this burden was moderated when certiorari was denied, 1937, 302 U. S. 753, 1937 A. M. C. 1646, to review *The Niel Maersk* (2CCA, 1937), 1937 A.M.C. 975, 91 F. (2d) 932, in which it was held that the shipper must affirmatively establish the good condition at time of shipment of goods damaged by heating, where the carrier claimed the cause to have been inherent vice. This would suggest that whenever cargo damage could have been causd by internal defects, the shipper must disprove such defects in order to recover even if the carrier's failure to exercise due diligence in stowing or caring for the cargo may have caused or contributed to the damage; *The Niel Maersk,* supra; Contra: *The Nichiyo Maru* (4 CCA), 1937 A. M. C. 642, 89 F. (2d) 539. (In other cases in which both the carrier's fault and an excepted cause produced the damage, the carrier is liable for all the damage unless it can establish what proportion was due to the excepted cause; *Schnell v. The Vallescura,* supra). Although the ultimate burden

of proof differs as between a common carrier and a mere bailee, the initial duty of explaining the cause of damage is normally placed upon both bailee and carrier because, being in possession of the goods, they have the best and frequently the only knowledge of what actually took place. *Commercial Molasses Corp. v. N. Y. Tank Barge Corp.*, 314 U. S. 104, 1941 A. M. C. 1697. *But this rationale is hardly applicable to inherent vice or its obverse, the good condition of the goods at the time of shipment.* On the contrary, it is the shipper who has access to that information, and therefore, should be compelled to tender it." (Italics ours)

Under the foregoing facts and law applicable to this case, appellant contends as follows:

I.

The evidence does not prove that the barrels of herring were damaged while in appellant's possession.

II.

If the herring was damaged while in its possession, such damage resulted from the inherent vice of the cargo, i.e., its insufficient condition at the time of loading to successfully carry to destination in the ordinary stowage contracted for by appellee.

III.

The stowage was the usual and customary stowage afforded such cargo and was proper ordinary stowage under all the circumstances.

IV.

To the extent the stowage may have enhanced

the inherent vice of the barrels of herring due to warm atmospheric temperatures, calm air or other natural conditions as distinguished from negligent commission or omission of the carrier, the shipper must be held to have assumed such risk inherent in ordinary stowage on a twelve-day voyage during the summer months, as an accommodation between the perishable nature of cargo and the available shipping facilities from appellee's plant and other economic factors.

(4) ***Inherent Vice is Relative***

Bache v. Silver Line, 110 F. (2d) 60 (C.C.A., 2)

The contention last stated above is supported on broad principles in *Bache v. Silver Line,* 110 F. (2d) 60 (C.C.A., 2), dealing with a practical legal *conflict between inherent vice and alleged improper stowage.* The cited case shows a definite trend of law towards realism in dealing with this type of case. The shipment there was of bales of sheet rubber from Java to New York. The bales were held together by metal bands and, as a result of the manner of stowing in the ship by piling many bales on top of each other, some of the bales became badly twisted and crushed and were discharged in such condition that they could not be readily handled in processing, for which damages were claimed. The shipper contended in effect that the vessel knew

of the manner in which the bales were wrapped and held together, and knew that the weight of many tiers would crush and twist the bales, and therefore that the stowage should have been in a manner to avoid this result. The vessel contended that the bales were improperly packaged for such a voyage, that the bales had to be stowed in tiers to utilize the space of the vessel, and that customary stowage was afforded. These contentions presented a conflict of interests to which the law must "always come to some accommodation between ideal perfection of stowage and entire disregard of the safety of the goods" (P. 62).

By analogy, and considering barrels of mild cured salt herring in lieu of bales of rubber, and the various cargo factors applicable to mild cured herring, such as (1) the degree of cure afforded by the processor (the milder the cure the more perishable the commodity), (2) the length of time the barrels are held at the processing plant after packing, (3) the length of the voyage, (4) the time of year, and (5) that only ordinary stowage is available and contracted for, the language and theory of the cited case is peculiarly applicable here. The shipper knows these cargo factors, the carrier knows that the shipper knows of the usual and available type of stowage on board the ship. The carrier afforded lower hold stowage, which was known to be the cool-

est cargo space (there were actually barrels of herring in Nos. 1, 3 and 4 lower holds). No heat-producing cargo, such as fish meal, was placed in the same compartment with the herring. All of these factors at once call for application of the "accommodation" mentioned by the court in the cited case. Obviously, the shipper—processor of the herring—must create a product sufficiently cured and sufficiently fresh and stable to withstand the transport it knows the herring will be subjected to on a voyage from Kodiak to Seattle in the summer months in ordinary stowage. Obviously the vessel must afford the best practical ordinary stowage available under all the circumstances.

The following language of the court in the *Bache v. Silver Line* case (supra), when applied to the factors involved in shipping barrels of mild cured salt herring, is in point and establishes appellant's freedom from liability in our present case as in the cited case:

> "All this is quite true; and it is also true that if goods, as they are wrapped or cased, are not fitted to endure the ordinary hazards of the voyage, the ship is not liable. §1304(2)(n), Title 46 U. S. Code, 46 U. S. C. A. §1304(2)(n). These two dictrines clash, if each is applied with unsparing logic. On the one hand there are very few goods, cased or not cased, that some degree of care will not protect from the perils of a sea voyage; and on the other there are few that cannot be packed or cased so that they

will survive the roughest handling. Here, for example, the bales could have been stowed in two or three tiers, and perhaps would not have been crushed enough to count, though even that is an assumption. Also the libellants could have cased them, as is sometimes done, and they could have been safely stowed in seventeen tiers, as in part they were. To stow the goods as the libellants insist was required, would impose a loss upon the ship; to case them, a loss upon the shipper. Moreover, it is as legitimate an answer for the ship to make to the shipper, that if he delivers the bales, knowing that the customary stowage may damage them, he cannot insist that the stowage is bad; as it is for the shipper to make to the ship that if the ship accepts them uncased, it is bad stowage not to limit the tiers. The greater part of the law is made up of the compromise of such conflicts of interest; and this is no exception. In the carriage of goods the trade must always come to some accommodation between ideal perfection of stowage and entire disregard of the safety of the goods; when it has done so, that becomes the standard for that kind of goods. Ordinarily it will not certainly prevent any damage, and both sides know that the goods will be somewhat exposed; *but if the shipper wishes more, he must provide for it particularly.*"

It would seem that our prsent case is a proper one for the application of the principles established in *Bache v. Silver Line,* supra.

The position of appellant carrier in this controversy involves these factors—barrels of salt herring are a frequent and usual semi-perishable cargo in the Alaska trade—the DENALI has successfully carried many barrels of herring in its lower holds,

including No. 3 and No. 4 lower holds—barrels of herring are tendered to the vessel at the processing plant without any possible inspection of the sealed barrels and in the absence of advices to the contrary, the carrier must assume that the herring is in proper condition to be carried as usual under the circumstances known by the shipper, i.e., the length of the voyage, that it is being made in the summer months, and that no refrigeration is afforded.

The position of the appellee shipper, on the other hand, is this—it is known from years of experience that the herring must be sufficiently cured to withstand the usual waiting period and necessary voyage from Kodiak to Seattle in ordinary stowage—the shipper has shipped many barrels of herring on the S.S. DENALI and understands it is contracting for such stowage, in the lower holds—it is known that shipments made in the summer months may be subjected to warm atmospheric conditions and that the voyage will last so many days, during which time the barrels of herring will be subjected to all usual and normal conditions which the vessel will reasonably encounter — the trade requires a mild (Scotch) cure, as distinguished from a heavy (Norwegian) cure salt herring, and it is sought to give as mild a cure as possible and still have the herring remain stable until it reaches the consumer.

Being thus confronted with such conflicting in-

terests, the *Bache v. Silver Line* case (supra) holds that the law must reach an accommodation between these interests, which is another way of saying—"that which is fair to both parties."

Under the evidence in this case and all reasonable inferences therefrom the damage here is clearly the result of inherent vice either directly on the basis of actual bad order and condition at the time of shipment or indirectly because the herring were in insufficient good condition to withstand the transportation in ordinary stowage; the herring did not meet "the standard for that kind of goods" required of the shipper under the doctrine of *Bache v. Silver Line* (supra), and he must bear the loss.

Under the heading *"Inherent Vice and Insufficient Packing"* in Knauth on Ocean Bills of Lading —1947, page 173, is found the following applicable statement:

> "These two subjects may conveniently be discussed together. In each case the logical dilemma is the same. On the one hand it is well settled from ancient times that the ocean carrier is bound to know the characteristics of the cargo which it accepts, and to do whatever is reasonably necessary to provide a ship and stowage, including dunnage, which will result in the cargo being carried safely and delivered at destination in the same good order and condition as when received at the place of shipment. On the other hand, the ocean carrier and ship are not responsible for the inherent character of the article offered, nor for the method

of its wrapping by or on behalf of the persons who tender the goods for shipment. When these two doctrines clash, the trade must come to an accommodation between ideal perfection of stowage and entire disregard of the safety of the goods. The accommodation so arrived at by custom becomes a standard which the Court will read into the contract of carriage; it thus becomes the measure of the carrier's liability. When customary stowage results in damage to cargo of which the cargo owners complain, the burden of proof of the unreasonableness of the customary stowage is on the cargo interests. *The Silversandal* (*Bache v. Silver Line, Ltd.*), 1940 A. M. C. 731 (2CCA)."

C. ***Third Assignment of Error Relied Upon.***

"15. That the Court erred in failing and refusing to find that the damage to the portion of the shipment stowed in No. 4 lower hold (to-wit, 183 barrels — medium; 94 half barrels— large; and 110 quarter barrels) resulted solely and proximately from the unavoidable delay in discharge of said hold due to the strike effective between September 5, 1946, and September 25, 1946, for which respondent is not liable within the bill of lading exceptions and Section 4(2)(j) of the Carriage of Goods by Sea Act, 1936 (46 U. S. C. 1304)." (Aps. 89)

The issue of the "strike exception" as to 387 barrels of herring stowed in No. 4 lower hold, transportation of which was contracted for in the bill of lading incorporating the United States Carriage of Goods by Sea Act, 1936 (46 U. S. C. §1304) (Aps. 47), was raised affirmatively in appellant's answer to the amended libel (Aps. 33). The trial court did not deal with this issue in its decision (Aps. 69)

or in the findings of fact and conclusions of law (Aps. 76), and this was plainly error.

Based upon the evidence heretofore discussed in this brief, it is uncontroverted that the 387 barrels of herring stowed in No. 4 lower hold were not and could not have been discharged from the ship until September 25, 1946, because of a general maritime strike at the port of Seattle, effective September 5, 1946, when the crews of all vessels, including the DENALI, walked off the vessels. This portion of the shipment, therefore, remained on board the vessel for three weeks longer than the portion of the shipment discharged from No. 3 lower hold on September 4, 1946, just prior to the strike. There is no evidence of any examination or inspection of this portion of the shipment upon arrival at Seattle on September 4, and therefore no evidence of its condition upon arrival at destination and prior to the strike.

This portion of the shipment was inspected after discharge from the vessel on September 26. Of 387 barrels discharged from No. 4 lower hold, 278 barrels were found unfit and 109 were usable (Aps. 255). The condition was more uniform than the lot of 971 barrels examined on September 5.

> "Q. (By Mr. Wakefield): With respect to the barrels that you examined on September 26th, the balance of the shipment, how did they com-

pare with those that you examined on September 5th?

"A. (By Mr. Kniseley, appellee's expert witness): The condition was more nearly uniform. I didn't notice so many that were extremely bad. But they were all I believe worse than the best ones that I examined on September 5th.

"Q. Did that same condition that you explained exist with respect to the oil and the softness of the fish?

"A. Yes." (Aps. 224)

The evidence further shows that the barrels stowed in No. 4 lower hold were the last ones packed and were therefore the freshest (Aps. 146). The No. 3 lower hold was first loaded with the "about 400 barrels" from the dock and then from inside the plant, so that when 971 barrels had filled No. 3 lower hold and loading commenced in No. 4 lower hold, the newest processed barrels were then loaded (Aps. 151, 159).

The No. 3 lower hold shipment had 354 unfit barrels corresponding roughly to the number piled on the face of the dock and the balance were in varying conditions, many of which brought 75% of full market value, but as those from No. 4 lower hold were necessarily held aboard the vessel for three additional weeks but were fresher or newer fish, they held up longer and nevertheless 278 barrels of this lot spoiled due to delay in discharge.

None of the evidence as to heat in the hold, heat

in the barrels of herring or other facts developed as to possible heat with respect to No. 3 lower hold and barrels of herring discharged from this hold, applies to No. 4 lower hold. In addition, No. 4 lower hold, due to its location at the stern of the vessel, may well be assumed to have been somwhat cooler (Resp. Ex. A-4). No temperatures were taken in No. 4 lower hold nor of the barrels of herring discharged from this hold.

On this basis no justification is possible for finding excess heat in No. 4 lower hold, and the unavoidable delay in discharging for three weeks on account of the general maritime strike must inevitably have caused or contributed to the damaged condition of the barrels of herring therefrom. This falls within the "strike exception," and appellant is not liable for any damage to herring in No. 4 lower hold.

This court had occasion to pass on the strike exception in the *Maui,* 113 F. (2d) 1018 (C.C.A., 9). That case involved spoilage of perishable cargo loaded on the vessel the day the strike was called. The cargo spoiled before the strike terminated and the vessel was relieved from liability under the bill of lading exception against strike. The court said:

> " * * *. When appellee proved that the loss arose from an excepted cause (strike), it discharged the burden resting immediately upon it. *The Malcolm Baxter,* supra; *United States*

v. Los Angeles Soap Co., 9 Cir., 1936 A. M. C. 850, 83 F. (2d) 875."

Appellant contends that with respect to damage to the 387 barrels of herring stowed in No. 4 lower hold, the exception against "strike" is a further ground for denial of any recovery by appellee with respect to that portion of the shipment.

CONCLUSION

Appellant's contention on this appeal may be summarized as follows:

1. ***Good Order and Condition—Burden of Proof.***

A. The cargo being perishable and concealed within barrels, there is no presumption or prima facie case of good order and condition at time of shipment arising from the bill of lading recital of receipt in "apparent good order and condition," and appellee has the burden of proving actual good order and condition.

B. Appellee has not sustaind such burden of proof either by direct evidence or by reasonable inference from all the proven facts, and the lower court's finding to the contrary is based upon speculation and conjecture.

C. With respect to such a perishable commodity as herring, proof of usual and customary processing 13 to 30 days prior to shipment, without proof of

actual degree of curing or of actual inspection of their condition at or proximate to the time of shipment, is not sufficient to sustain the burden of proof cast upon appellee.

D. No legal proof of good order and condition at time of shipment is established by inference from evidence of usual processing when the facts proven at the trial are fully as consistent (and we think much more consistent) with a contrary inference. We refer to such proven facts as the following:

(1) Mild cured salt herring is a perishable commodity, which must be kept cool.

(2) The herring in question were packed and processed between July 24 and August 10, 1946, and were held in ordinary warehouse storage by appellee until shippd August 23, 1946.

(3) About 400 barrels were piled on the open dock at the plant for five or six days before the vessel arrived and at the time of loading were dry and warm.

(4) August 1946 was an exceptionally dry month in the vicinity of Port Wakefield.

(5) The lower hold stowage afforded the barrels was usual stowage for this commodity.

(6) The voyage was usual and normal, without fortuitous occurrence.

(7) Appellee's expert witness Kniseley testified that barrels of herring in proper condition would

not spoil for thirty to forty-five days in temperatures of 65° to 70°.

(8) The 971 barrels outturned from No. 3 lower hold on September 4, 1946, were in varying condition—356 were unfit for human consumption—496 were good enough to sell for 75% of full market price.

(9) The 387 barrels outturned from No. 4 lower hold on September 25, 1946, having remained in the vessel three weeks longer than those in No. 3 lower hold due to the strike, were in more uniform condition—none so bad and none so good—278 were unfit for human consumption and 109 sufficient to be sold.

Other collateral facts developed in this brief warrant the same inference of insufficient condition for the voyage undertaken.

2. ***Excessive Heat***

The lower court found that the damage in this case was due to "excessive heat" in No. 3 and No. 4 lower holds. There is no proof or reasonable inference from facts proven that there was any abnormal heat whatsoever in No. 3 and No. 4 lower holds on the voyage in question or that the barrels of herring were damaged at all from any cause while on board the vessel, except the inherent vice of the cargo.

A. Appellee's evidence of alleged excessive heat amounts only to temperature taken in No. 3 lower hold fifteen hours after discharge and five to six hours after the vessel had been closed down on account of strike; thermometer readings of internal temperature in twelve of the worst barrels, ranging from 70° to 77° some fifteen hours after their discharge from the ship; and testimony of an insulated steam pipe in each of the two shaft alleys.

B. Explaining these matters and militating against the court's conclusions from the foregoing is uncontroverted evidence to the following effect:

(1) Closing down the ship, as because of strike, raises the temperature of the holds, due to shutting down ventilation, fans, blowers, hatches, watertight doors, etc., and temperatures taken in a hold five to six hours afterwards are no criteria of temperatures under operating conditions—it would be much warmer when shut down, at least until the dead ship had had time to cool off naturally.

(2) Neither No. 3 nor No. 4 lower holds are warm holds.

(*a*) They are below the water line.

(*b*) There are no steam pipes in either hold.

(*c*) No heat comes from the shaft alleys—the bearings are cool, the steam pipe inside is insulated, and the alleys themselves are ventilated through an escape hatch.

(*d*) No. 3 lower hold is separated and insulated from the engine room by two bulkheads accommodating a four-foot wide companionway connecting the two shaft alleys.

(*e*) Semi-perishables, including mild cured herring, are successfully carried in these holds.

(3) There was no other cargo stowed in either hold on the voyage in question which could produce heat—only canned salmon.

(4) The holds were not warm when inspected by the Chief Officer when loading canned salmon in these holds as long as five days after loading the barrels of herring at Port Wakefield.

(5) Nothing occurred on the voyage in question of a fortuitous nature or otherwise which could account for heat—everything was normal.

(6) Opinions of persons qualified to know (Surveyor Gow, Chief Mate Burns, Purser Teicheroew and Stevedores Hanson and Damalin) are to the effect that these are not warm holds and that they are proper for stowage of barrels of mild cured herring.

(7) The outside of the barrels at the time of discharge at Seattle after a twelve-day voyage felt only "tepid."

C. In any event the so-called "excessive heat" as applied to mild cured herring shipped at the request of appellee in ordinary stowage on a twelve-

day voyage in the summertime is relative and the evidence furnishes no criteria of the degree of heat intended to be found by the trial court as "excessive."

(1) Mr. Kniseley, appellee's witness, estimated that proper mild cured herring would spoil in thirty to forty-five days in temperatures ranging between 65° and 70°.

(2) It is stimated that the degree of cure put into the herring varies and that the milder the cure the more perishable the herring. This was a mild cure in only 85% solution.

(3) Appellant has no knowledge of the condition or degree of cure or how perishable any particular lot of herring may be and only contracts to give ordinary and customary stowage.

(4) Appellee's president was present when the barrels were loaded into No. 3 and No. 4 lower holds, as he had been on previous occasions on this same vessel.

D. None of appellee's so-called direct evidence has any bearing upon temperatures in No. 4 hold at any time.

3. *Inherent Vice as Related to Order and Condition at Time of Shipment.*

Inherent vice with respect to barrels of mild cured herring can relate to actual bad condition at time

of loading or, even though they be sound when shipped, to insufficient condition of the fish to remain sound under the circumstances of the stowage and voyage undertaken and contracted for.

A. In the absence of advice to appellant to the contrary, and there was none here, appellant need only furnish the usual and customary stowage afforded barrels of mild cured herring in the usual condition for carriage on the voyage undertaken.

B. That damage resulted or was enhanced on board the vessel does not render appellant liable if appellant furnished the usual and customary stowage afforded such shipments as established by the trade and proven sufficient and proper (*Bache v. Silver Line,* supra).

C. Whether temperature is "excessive" in a hold must necessarily be premised upon other proven factors, such as the degree of cure and age of, and prior temperatures experienced by, the cargo at the time of loading, and where there is no evidence of *actual* condition of the cargo when delivered to the vessel and the vessel affords usual and customary stowage and there is no proof of negligence or fortuitous occurrence, and it appears there was nothing more than a normal voyage, the cargo owner cannot recover merely because his shipment is discharged in a deteriorated condition of an inherent nature, such as decay and spoilage.

(1) The damage to the herring (without reference to the extent of cure) is said to have resulted from "elevated temperature," which is from any kind of heat, natural or artificial. On the premise that the milder the cure the more perishable are the herring, the temperature, whatever it may be in degrees, may be excessive or not depending upon many factors pertaining to the condition of the herring when shipped.

(2) In ordinary stowage in No. 3 and/or No. 4 lower holds it can be assumed for the purpose of illustration that the temperature may normally vary from 65° to 70° (or other similar range of degrees) depending upon the outside temperature during a summer voyage. This may be excessive for barrels of herring which have been held at the processing plant for fifteen to thirty days, or for barrels which have stood on the open dock for five or six days, or for barrels which have a milder cure than usual, but would not be excessive for other barrels in a different condition, i.e., more firmly cured, fresher, or subjected to lower temperature prior to loading.

(3) If as the evidence shows a given fresh barrel of herring with a particular degree of cure and repacked in a heavy brine will remain stable only for a certain time at a fixed temperature, it is at once apparent that any finding of excessive temperature

is only warranted when all of the other necessary facts are known. Our closest estimate of the normal temperature of a barrel of salt herring is "in the neighborhood of 60 or 70" (Aps. 221). If as appellee's witnss Kniseley testified a barrel of mild cured salt herring will remain stable for thirty to forty-five days subjected to interior temperature of 65° to 70°, admittedly a rough estimate, then it may well be that some or all of the barrels in question had been subjcted to such temperatures at the processing plant for from fifteen to thirty days at time of loading, and that those 400 piled on the open dock had been subjected to even higher temperature for five to six days, and therefore upon loading the remaining time left for the barrels to remain stable had been so shortened that after a twelve-day normal summer voyage they were spoiled. If we add the possibility of the cure being a little milder than usual, or the repacking brine less strong than usual, this possibility is even more certain. This inference is strengthened by the actual condition on outturn from No. 3 lower hold—356 spoiled and almost 500 good enough to be sold for 75% of market. In No. 4 lower hold (none of the barrels having been on the open dock and all being fresher at time of loading) none of the barrels were in as bad condition as the 356 spoiled barrels from No. 3 lower hold, even

though they had remained in the ship for an additional twenty-one days.

The foregoing illustrates clearly the unfairness of the lower court's unequivocal findings of "good order and condition," and of "excessive heat" in No. 3 and No. 4 lower holds, and proves that many inferences and conjectures can reasonably result from the facts proven and that these are as consistent, if not more consistent, with a finding of proper and customary care and stowage as with any finding of excessive heat in the holds.

4. *The Strike*

The damage to 387 barrels in No. 4 lower hold, insofar as it occurred on board the vessel, was inevitably and immeasurably enhanced, if not solely caused, by delay in discharge for twenty-one days due to a general maritime strike and the inability of appellant to discharge the cargo. This situation is covered by the "strike exception" in the bill of lading and appellant is thereby relieved from liability in any event for damage to the herring discharged from No. 4 lower hold. The extent of this damage can be readily computed from the evidence. The lower court makes no mention of the strike or the defense interposed.

WHEREFORE, appellant contends—

1. The lower court erred in finding that appellee

sustained the burden of proof and/or that in fact the barrels of herring were in "good order and condition" at the time of shipment.

2. The lower court erred in finding that the contents of the barrels of herring were damaged while on board appellant's vessel.

3. The lower court erred in finding "excessive heat" in No. 3 and No. 4 lower holds, and that this was the "sole and proximate cause of the damage."

4. The lower court erred in failing to find that the damage to 387 barrels of herring in No. 4 lower hold, insofar as it resulted on board the vessel, was excused under the "strike exception" of the bill of lading.

Respectfully submitted,

J. CHARLES DENNIS,
United States Attorney.

BOGLE, BOGLE & GATES,
CLAUDE E. WAKEFIELD
M. BAYARD CRUTCHER
(Of Counsel)
Proctors for Appellant.

603 Central Building,
Seattle 4, Washington.